No. 89-1048

In The

Supreme Court of the United States

October Term, 1989

FMC CORPORATION,

Petitioner,

vs.

CYNTHIA ANN HOLLIDAY,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

REPLY BRIEF FOR PETITIONER

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

I. Neither The Plain Language Of The Deemer Clause Nor Its Legislative History Support The Alternative Constructions Urged By The Respondent And The *Amici* 1

A. The Plain Language Of The Deemer Clause Does Not Support Any Of The Alternative Constructions Suggested By The Respondent 2

B. The Legislative History Does Not Support The Alternative Constructions Urged By Respondent. 7

II. Preemption of State Insurance Law As Applied To Self-Funded Plans Furthers The Purposes of ERISA And Does Not Create The Problems Suggested By Respondent And The *Amici* 10

A. Congress Sought Uniform Federal Regulation of ERISA Benefit Plans 11

B. Congress Intended ERISA To Protect Plan Participants 13

C. The Limitations of ERISA Preemption Will Prevent The Abrogation Of State Law Predicted By The Respondent 15

CONCLUSION 16

TABLE OF AUTHORITIES

Page(s)

CASES

Aloha Airlines, Inc. v. Director of Taxation, 464 U.S. 7 (1983) 8

Drexelbrook Engineering Co. v. Travelers Ins. Co., 710 F. Supp. 590 (E.D.Pa.); *aff'd without opinion*, 891 F.2d 280 (3d Cir. 1989) 3, 12

Exxon Corp. v. Hunt, 475 U.S. 355 (1986) 8

Firestone Tire and Rubber Co. v. Bruch, 109 S.Ct. 948 (1989) 14

FMC Corp. v. Holliday, 885 F.2d 79 (3d Cir. 1989), *cert. granted*, 110 S.Ct. 1109 (1990) 3, 4

Fort Halifax Packing Co. v. Coyne, 482 U.S. 1 (1987) .. 11, 14

Insurance Bd. of Bethlehem Steel Corp. v. Muir, 819 F.2d 408 (3d Cir. 1987) 12

Mackey v. Lanier Collections Agency & Service, Inc., 486 U.S. 825 (1988) 14, 15, 16

Massachusetts v. Morash, 109 S.Ct. 1668 (1989) 13

Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724 (1985) ..... *passim*

Northern Group Services, Inc. v. Auto Owners Ins. Co., 833 F.2d 85 (6th Cir. 1987), *cert. denied*, 486 U.S. 1017 (1988) 3

Park N' Fly, Inc. v. Dollar Park and Fly, Inc., 469 U.S. 189 (1985) 1

Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41 (1987) ... 1, 4, 15

SEC v. National Securities, Inc., 393 U.S. 453 (1969) 6

Shaw v. Delta Air Lines, Inc., 463 U.S. 85 (1983) 11, 14, 15, 16

TABLE OF AUTHORITIES – Continued

Page(s)

STATUTES

29 U.S.C. §1144 10

29 U.S.C. §1144(b)(2)(B) 2, 4

42 U.S.C. §300e-10 10

75 Pa. Cons. Stat. Ann. §1719 (Purdon 1984) 13

75 Pa. Cons. Stat. Ann. §1720 (Purdon 1984) 2

OTHER AUTHORITIES

Staff of Senate Comm. on Labor and Public Welfare, 94th Cong., 2d. Sess., *reprinted in* Legislative History of ERISA, 4670 (Comm. Print 1976) 13

Brief of *Amici Curiae* National Conference of State Legislatures, *et al.*, *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724 (1985) (Nos. 84-325 and 84-356) 1, 6

REPLY BRIEF OF PETITIONER

I. Neither The Plain Language Of The Deemer Clause Nor Its Legislative History Support The Alternative Constructions Urged By The Respondent and The *Amici*.

The "ultimate touchstone" of every preemption question is congressional intent. *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 45 (1987). Thus, in this case of express preemption, the inquiry must "begin with the language employed by Congress *and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose.*" *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 740 (1985) (quoting *Park N' Fly, Inc. v. Dollar Park and Fly, Inc.*, 469 U.S. 189, 194 (1985)) (emphasis added). Despite explicitly and implicitly conceding that FMC's reading of the deemer clause is completely in accord with the statutory language,[1] Respondent and the *amici* nonetheless argue that the deemer clause does not mean what it says. Their analysis ignores parts of the

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[1] *See* Respondent Brief at 9 ("Petitioner and the Solicitor General narrow their arguments to focus upon the 'deemer clause' itself."); Brief of the American Chiropractic Association at 14 ("[T]he language used by Congress in the deemer clause may appear to prevent the application of every state insurance law to every employee benefit plan. . . . "). *See also* Brief of *Amici Curiae* National Conference of State Legislatures, *et al.* at 11 n. 23, submitted in *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724 (1985) (Nos. 84-325 and 84-356) ("This 'deemer' clause simply prohibits the state from regulating employee welfare plans by calling them insurers. It does not prohibit the state from regulating bona fide insurers when they are doing business with employee benefit plans.").

language of the deemer clause, misinterprets the fragments of the statute and ERISA's legislative history upon which they focus[2] and fails to suggest a clear and rational alternative rule of decision which will resolve deemer clause issues. Thus, this Court should reject the alternative constructions of the deemer clause offered by the Respondent and the *amici* and interpret the clause as drafted by Congress: to prevent application of state insurance laws to self-funded employee benefit plans.

A. The Plain Language Of The Deemer Clause Does Not Support Any Of The Alternative Constructions Suggested By The Respondent.

The plain language of the deemer clause prohibits states from treating employee benefit plans as if they were "an insurance company or other insurer . . . or engaged in the business of insurance . . . for the purposes of any law of any State purporting to regulate insurance companies [or] *insurance contracts*. . . . " 29 U.S.C. §1144(b)(2)(B) (emphasis added). Respondent and the *amici* concede that Section 1720 of the Pennsylvania Motor Vehicle Financial Responsibility Law of 1984 (the "Financial Responsibility Law"), 75 Pa. Cons. Stat. Ann. §1720 (Purdon 1984), treats FMC's self-funded benefit

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[2] Because the statutory language unambiguously preempts Section 1720 of the Financial Responsibility Law, this search for congressional intent in ERISA's legislative history is unnecessary. *See infra* pp. 7-8.

plan as if it were engaged in the business of insurance.[3] Thus, the correct result under ERISA's express preemption provisions and *Metropolitan Life* is that Section 1720 is preempted from application to self-funded benefit plans. In their effort to avoid this result, Respondent and *amici* stray from the statute's plain language in search of vague "alternative" constructions of the deemer clause. None of the alternatives presented is grounded in ERISA's statutory language, its legislative history or in this Court's precedent.

FMC's initial brief on the merits detailed the reasons why two of the alternative constructions suggested by the Respondent, those set forth by the court below and by the Sixth Circuit in *Northern Group Services, Inc. v. Auto Owners Ins. Co.*, 833 F.2d 85 (6th Cir. 1987), *cert. denied*, 486 U.S. 1017 (1988), are incorrect. *See* Petitioner Brief at 10-27.[4] Thus, this brief will focus primarily on the third,

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[3] *Amici*, the National Conference of State Legislatures, *et al.* (hereinafter the "NCSL"), argue simply that Section 1720 of the Financial Responsibility Law is not among the laws that Congress meant to preempt by the deemer clause. The NCSL, like Respondent, concedes that Section 1720 treats the Health Plan in exactly the same way in which it regulates all other insurance arrangements.

[4] The Third and Sixth Circuits ground their holdings in the statutory language *only* by focusing narrowly on Congress' use of the word "purporting." *See FMC v. Holliday*, 885 F.2d 79, 86-87 (3d Cir. 1989), *cert. granted*, 110 S.Ct. 1109 (1990); *Northern Group Services*, 833 F.2d at 93 n.3. The NCSL expressly disavows this approach. *See* NCSL Brief at 15 n. 8 ("[W]e would not put the inquiry in terms of 'pretext.' "). It also appears that the Third Circuit has disavowed its own construction of the deemer clause by affirming a decision that adopted FMC's position. *See Drexelbrook Engineering Co. v. Travelers Ins. Co.*, 710 F. Supp. 590 (E.D. Pa.), *aff'd without opinion*, 891 F.2d 280 (3d Cir. 1989).

and most recent, construction to arise in this case, *i.e.*, the deemer clause should be construed to allow states to apply to self-funded plans any insurance law not intended to regulate "insurance as a business." *See* Respondent Brief at 8; NCSL Brief at 7, 12-16.

This narrow construction of the deemer clause is unacceptable for a variety of reasons. First, as Respondent aptly notes, "when expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy." *See* Respondent Brief at 9-10 (quoting *Pilot Life Ins.*, 481 U.S. at 51 (1987) (citations omitted)). The Respondent and the NCSL, however, violate this fundamental canon of statutory construction.

Indeed, the NCSL reaches its construction of the deemer clause only by focusing on a fragment of the deemer clause, the phrase "business of insurance." *See* NCSL Brief at 14-15. It conveniently omits from its analysis that portion of the deemer clause prohibiting states from applying to self-funded plans laws "purporting to regulate insurance companies [or] *insurance contracts*." 29 U.S.C. § 1144(b)(2)(B). Because Section 1720 of the Financial Responsibility Law regulates the terms of insurance contracts, *see FMC*, 885 F.2d at 86, it is certainly within the reach of the deemer clause.

The NCSL then strays further from fundamental methods of statutory construction by construing the deemer clause without reference to the saving clause.[5] In

[5] As this Court has stated, the deemer clause modifies the saving clause. *Metropolitan Life*, 471 U.S. at 741.

Metropolitan Life, this Court looked to the deemer clause for guidance in interpreting the saving clause and found the reference to insurance contracts particularly enlightening:

> By exempting from the saving clause *laws regulating insurance contracts that apply directly to benefit plans*, the deemer clause makes explicit Congress' intention to include laws that regulate insurance contracts within the scope of the insurance laws preserved by the saving clause. Unless Congress intended to include *laws regulating insurance contracts* within the scope of the insurance saving clause, it would have been unnecessary for the deemer clause explicitly to exempt such laws from the saving clause when they are applied directly to benefit plans.

471 U.S. at 741 (emphasis added). Thus, when construed in accordance with the plain language of the statute and the teaching of *Metropolitan Life*, the deemer clause prohibits states from applying directly to self-funded plans laws that regulate insurance contracts.

The second flaw in the NCSL's argument is that its apparent definition of "business of insurance" is completely at odds with this Court's well-established definition of that phrase.[6] This Court has long held that when Congress uses the phrase "business of insurance," it is

[6] The NCSL never actually defines the phrase "business of insurance," preferring instead to give examples of those state laws which relate to the business of insurance. *See, e.g.*, NCSL Brief at 2 (laws "involving licensing and capitalization of insurance companies") and 14 (laws "directed at the creation, management and structure of insurers").

focusing on the relationship between the insurer and his insured:

> The relationship between the insurer and the insured, *the type of policy which could be issued*, its reliability, its interpretation, and enforcement – these were the core of the "business of insurance." . . . Statutes aimed at protecting or regulating [the insured – insurer] relationship, directly or indirectly, are laws regulating the "business of insurance."

Metropolitan Life, 471 U.S. at 744 (quoting *SEC v. National Securities, Inc.*, 393 U.S. 453, 460 (1969)) (emphasis in original). Significantly, when it appeared as *amicus curiae* in *Metropolitan Life*, the NCSL was in complete agreement with the definition of "business of insurance," as set forth in *National Securities*. *See* Brief of *Amici Curiae* National Conference of State Legislatures *et al.* at 14-15, *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724 (1985) (Nos. 84-325 and 84-356). As the NCSL recognized in 1985, when Congress uses the phrase "business of insurance," it simply does not distinguish between those laws regulating "insurance as a business" and those laws regulating the insured – insurer relationship. Thus, the NCSL may not now inject such a distinction into the deemer clause.

Moreover, this Court in *Metropolitan Life* rejected a distinction between "traditional" insurance laws and "innovative" insurance laws, *see Metropolitan Life*, 471 U.S. at 741, that is analogous to the NCSL's distinction between laws regulating the business of insurance and the insurer – insured relationship. *See* NCSL Brief at 14. This Court in *Metropolitan Life* found the traditional –

innovative dichotomy "unpersuasive" because: (1) neither the saving clause nor the deemer clause make such a distinction; (2) the legislative history does not support it; and (3) such a construction violates the plain meaning of the statutory language. *Id.* at 741-42. For those same reasons, the construction of the deemer clause advocated by the NCSL must fail.

Finally, Respondent and NCSL suggest that the deemer clause is not meant to preclude the application of state insurance laws directly to plans because the clause does not, on its face, make a distinction between insured and self-insured plans. *See* Respondent Brief at 9; NCSL Brief at 20. This position is disingenuous and flatly wrong. As the *Metropolitan Life* Court determined, the distinction between insured and self-funded plans is the *result* of the interaction between the saving and deemer clauses. 471 U.S. at 747.[7] FMC's construction of the deemer clause observes this distinction, in keeping with both the statutory language and *Metropolitan Life*.

B. The Legislative History Does Not Support The Alternative Constructions Urged By Respondent.

"When a federal statute unambiguously precludes certain types of state legislation, [this Court] need go no further than the statutory language to determine whether

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[7] Despite chiding FMC for its reliance on *Metropolitan Life*, Respondent concedes, as it must, that no decision is more important to this case since, in *Metropolitan Life*, this Court had the opportunity to review the interaction of the saving and deemer clauses. Respondent Brief at 16.

the state statute is preempted." *Exxon Corp. v. Hunt*, 475 U.S. 355, 362 (1986) (citing *Aloha Airlines, Inc. v. Director of Taxation*, 464 U.S. 7, 12 (1983)). In this express preemption case, the wide ranging search by Respondent and the *amici* for congressional intent is inappropriate. *See Aloha Airlines*, 464 U.S. at 12 n.5 (noting that such a search for congressional intent is only appropriate in cases of implied preemption). Additionally, the legislative history is not particularly enlightening on the precise issue presented here, because there is little, if any, legislative history directly relevant to the relationship between the saving and deemer clauses. *See Metropolitan Life*, 471 U.S. at 745.[8] Nevertheless, the NCSL contends that the legislative history *requires* a construction of the deemer clause that allows states to regulate the terms of self-funded benefit plans, a position that is flawed for three basic reasons.

First, the NCSL argues that since the language of the deemer clause remained unchanged while the broad preemption provision, Section 514(a), was expanded, one *must* infer that the deemer clause was relegated to performing the more narrow, specified work designated for the original preemption clause. *See* NCSL Brief at 12. This

[8] The Respondent mischaracterizes FMC's use of the legislative history. *See* Respondent Brief at 12. FMC relied on the legislative history of ERISA only to confirm that the results flowing from its construction of the deemer clause are in accord with generally expressed congressional intent. *See* Petitioner Brief at 27-32.

argument is illogical and betrays NCSL's fundamental misunderstanding of the interworkings of ERISA's preemption provisions. The deemer clause modifies the saving clause, not Section 514(a). *See Metropolitan Life*, 471 U.S. at 741. Accordingly, the fact that Congress broadened Section 514(a) says nothing about the relationship between the saving and deemer clauses.[9] To conclude otherwise is to defy logic.

Second, in the absence of legislative history supporting its position, the NCSL must contrive a "hypothetical" legislative intent. *See* NCSL Brief at 12-15. The NCSL first creates a "specific and limited problem" which pre-ERISA self-funded benefit plans purportedly faced, namely, the possibility that states would drive them out of business by regulating them as commercial insurers. *Id.* Significantly, the legislative history makes no reference to the specific problem identified by the NCSL. The legislative silence reveals that the NCSL is engaged in speculation as to whether this problem actually existed, whether it had any effect on congressional intent and whether this problem, if it was considered by Congress, led to the passage of the deemer clause.

Finally, in dismissing the legislative history regarding the breadth of ERISA preemption as not helpful and "simply beside the point," *see* Respondent Brief at 12, 17; NCSL Brief at 17, Respondent and *amici* ignore the only clear congressional intent regarding the scope of ERISA

[9] Of course, the fact that Congress broadened Section 514(a) does demonstrate that Congress sought to establish clearly that regulation of benefit plans was to be exclusively a federal concern.

preemption. By broadening the scope of Section 514(a), Congress evinced an unmistakable intent to make employee benefit plan regulation exclusively a federal matter. Yet, under any of the three alternative approaches advocated by Respondent, the scope of ERISA preemption would be narrowed, with the result that states could effectively govern the content and interpretation of benefit plans under the guise of their insurance, banking and securities laws.[10] Surely, Congress did not intend such a result.[11]

II. Preemption of State Insurance Law As Applied To Self-Funded Plans Furthers The Purposes of ERISA And Does Not Create The Problems Suggested By Respondent And The *Amici*.

Respondent and the *amici* cavalierly brush aside the difficulties that Congress intended to remedy by broad

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[10] For example, the mandated benefit laws at issue in *Metropolitan Life* would presumably be applicable to self-funded plans under any of the Respondent's alternative constructions of the deemer clause.

[11] The final piece of legislative history relied upon by the NCSL does not support its narrow construction of the deemer clause. *See* NCSL Brief at 18 (discussing comments of Representative Dent). Representative Dent's reference to the Health Maintenance Organization Act of 1973, 42 U.S.C. § 300e-10, is not particularly instructive as to the intended meaning of the deemer clause. The preemption provisions of the HMO Act and ERISA are drastically different, so it is difficult to discern exactly what Representative Dent meant by his vague reference to the HMO Act. If any lesson is to taken from the comparison of ERISA to the HMO Act, that lesson should be that Congress could specifically limit preemption of state insurance laws to those governing capitalization of insurance companies when that was, in fact, the result it desired. *Compare* 42 U.S.C. § 300e-10 *with* 29 U.S.C. § 1144.

preemption. At the same time, they predict that dire consequences would flow from construction of the deemer clause as enacted. None of their contentions, however, warrant deviation from the plain language of the deemer clause.

A. Congress Sought Uniform Federal Regulation of ERISA Benefit Plans.

This Court has recognized consistently that Congress was concerned that the burden of multiple and conflicting state regulation would discourage employers from establishing plans and would make plan administration difficult. *See, e.g., Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 11 (1987); *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 105 n.25 (1983). All of Respondent's alternative constructions of the deemer clause, however, allow states to regulate pervasively self-funded plans under the guise of their insurance law and thus would result in multiple state regulations being applied to single employee benefit plans. This plainly violates congressional intent.

Respondent and *amici* attempt to minimize this fact by fixing the Court's focus on the admitted disuniformities faced by multistate *insured* plans, the state-law disuniformities between insured and self-funded plans and any disuniformities which may ultimately result from "hybrid" plans.[12] However, this misses the point.

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[12] "Hybrid" plans are those self-funded plans that hire an insurance company to administer the plan or those plans that are self-funded to a certain level of risk with insurance covering the excess. Despite the NCSL's contention that "hybrid"

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These disuniformities "are the inevitable result of the congressional decision to 'save' local insurance regulation." *Metropolitan Life*, 471 U.S. at 747. Respondent and *amici*, by urging the adoption of one of their alternative constructions, would have this Court choose the disuniformities resulting from multiple state regulation of a single self-funded plan over the disuniformities which exist between insured and self-funded plans. Congress, however, chose the latter, and arguments over the wisdom of that choice must be directed there. *Ibid.*

Finally, The Pennsylvania Trial Lawyers Association asserts that, by the terms of the Health Plan, FMC invited some disuniformity when it "invoked" Pennsylvania's coordination of benefits law with respect to benefits provided by Mr. Holliday's no-fault motor vehicle insurance. *See* Trial Lawyers Brief at 17-20. This position is nonsensical. Although the Health Plan contains a coordination of benefits provision that *always* requires plan participants to resort first to their no-fault auto insurance, *see* J.A. 62-63 ("In the case of coverage by 'no-fault' automobile insurance, FMC will pay covered expenses not paid for by no-fault insurance."), it does not follow that FMC thereby invoked Pennsylvania's coordination of

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plans pose certain difficulties under FMC's construction of the deemer clause, *see* NCSL Brief at 23, courts have been dealing ably with those questions. *See, e.g., Insurance Bd. of Bethlehem Steel Corp. v. Muir*, 819 F.2d 408 (3d Cir. 1987); *Drexelbrook Engineering Co. v. Travelers Ins. Co.*, 710 F. Supp. 590 (E.D.Pa.) (collecting cases and holding that plan which purchased stop-loss coverage was self-funded for purposes of ERISA preemption), *aff'd without opinion*, 891 F.2d 280 (3d Cir. 1989).

benefits law.[13] Even if this were the case, this point is irrelevant to the appropriate construction of the language of the deemer clause and the intent of Congress.

B. Congress Intended ERISA To Protect Plan Participants.

Contrary to the NCSL's contention, NCSL Brief at 22, construction of the deemer clause in accordance with its plain language benefits plan participants. When it enacted ERISA, Congress chose not to regulate the substantive content of welfare-benefit plans, *see Metropolitan Life*, 471 U.S. at 732, but that does not mean that preemption of state insurance regulation as applied to self-funded plans creates a harmful "regulatory vacuum." *See* NCSL Brief at 22 (Preemption of state insurance law as applied to self-funded plans will "sweep away the protections of state insurance and health policy as well."). Simply put, the NCSL's "regulatory vacuum" argument is at odds with the protections that ERISA itself provides to benefit plan participants and is also inconsistent with the decisions of this Court.[14]

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[13] Pennsylvania makes the no-fault carrier the primary insurer for injuries sustained in auto accidents. 75 Pa. Cons. Stat. Ann. § 1719 (Purdon 1984).

[14] ERISA protects plan participants by "elaborate" reporting, disclosure and fiduciary requirements. *See Massachusetts v. Morash*, 109 S.Ct. 1668, 1671-72 (1989). Additionally, broad preemption itself protects plan participants. *See* Staff of Senate Comm. on Labor and Public Welfare, 94th Cong. 2d Sess., *reprinted in* Legislative History of ERISA 4670 (Comm. Print 1976) (statement of U.S. Rep. John Dent) ("With the preemption

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Moreover, the NCSL's "regulatory vacuum" argument proves too much. State laws providing an extra layer of "protection" to participants are not safe from preemption, even when those laws do not conflict with ERISA. *See Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85 (1983) (holding that ERISA preempts state anti-discrimination statute). *See also Mackey v. Lanier Collections Agency & Service, Inc.*, 486 U.S. 825, 830 (1988) ("Legislative 'good intentions' do not save a state law within the broad preemptive scope of Section 514(a).").

Finally, the NCSL's "regulatory vacuum" argument assumes that protection of plans and protection of plan participants are mutually exclusive. They are not. Establishment of benefit plans by employers is voluntary. *See Shaw*, 463 U.S. at 90. Congress sought to encourage the establishment of plans by making regulation of plans exclusively a federal matter. *See Fort Halifax*, 482 U.S. at 11. This statutory scheme thus inures to the ultimate benefit of plan participants by spurring the creation of plans where they might not otherwise exist. The Respondent's alternative constructions of the deemer clause will undermine this congressional goal to the detriment of current and prospective plan participants.

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of the field, we round out the *protection afforded participants* by eliminating the threat of conflicting and inconsistent state and local regulation.") (emphasis added). Plan participants may also take enforcement action against plan administrators with the conduct of those fiduciaries subject to *de novo* review by the courts where a plan does not give an administrator discretionary authority to determine eligibility for benefits or to construe the terms of the plan. *See Firestone Tire and Rubber Co. v. Bruch*, 109 S.Ct. 948, 956 (1989).

C. The Limitations Of ERISA Preemption Will Prevent The Abrogation Of State Law Predicted By The Respondent.

Respondent and the *amici* mischaracterize the ultimate effects of prohibiting states from imposing their insurance regulation on self-funded plans. They contend that allowing the deemer clause to prohibit state regulation of self-funded benefit plans will allow plans to make their own rules with drastic effects on state tort laws. *See* Respondent Brief at 27. This will simply not be the case.

State laws are preempted if they "relate to" employee benefit plans. *See Pilot Life*, 481 U.S. at 47. But, ERISA preemption is subject to some limitation because "[s]ome state actions may affect employee benefit plans in too tenuous, remote, or peripheral a manner to warrant a finding that the law 'relates to' the plan." *Shaw*, 463 U.S. at 100 n.21. Therefore, plan administrators will be unable to "write any procedural or evidentiary rule into its plan and seek to enforce it against non-beneficiaries," *see* Trial Lawyers Brief at 23, because the state laws that overreaching plan administrators might hope that ERISA would preempt would generally not relate to benefit plans. *See, e.g., Mackey v. Lanier Collections Agency & Service, Inc.*, 486 U.S. 825 (1988) (Georgia's general garnishment statute does not relate to ERISA benefit plans.).

However, despite the NCSL's contention to the contrary, *see* NCSL Brief at 5-6 n.2, the limits of ERISA preemption are not tested in this case. Section 1720 of the Financial Responsibility Law does relate to ERISA benefit plans. "A law 'relates to' an employee benefit plan . . . if it has a connection with or reference to such a plan."

Shaw, 463 U.S. at 96-97. Section 1720 has a direct effect on the relationship between the Health Plan and its participants. Furthermore, it singles out insurance arrangements, specifically including employee benefit plans, and takes away their contractual and common law subrogation rights. Thus, Section 1720 certainly "relates to" the Health Plan. *See Shaw*, 463 U.S. at 108 (Anti-discrimination statute which structures relation between participant and plan preempted.). *Cf. Mackey*, 486 U.S. at 830 (Anti-garnishment statute which expressly singles out ERISA plan for special treatment relates to benefit plan.). Accordingly, construction of Section 514 of ERISA to prevent application of Section 1720 to the Health Plan is appropriate, and such a result will not lead to the problems predicted by Respondent and *amici*.

CONCLUSION

Construction of the deemer clause will affect the states' authority to regulate self-funded plans in areas far beyond subrogation. Accordingly, a clear delineation of the boundary between the saving and deemer clauses is necessary to guide states and plans in their everyday operation. The holding of *Metropolitan Life* defined that boundary in a manner that comports both with the statutory language and congressional intent. None of the alternatives urged by the Respondent suggest a rule of decision that is faithful to the statutory language or provides for ease of application to other situations. Perhaps even more importantly, each of the alternatives allows states to regulate pervasively the terms of self-funded benefit plans. This undesirable and unacceptable result

should be avoided by reaffirming *Metropolitan Life* and adhering to the plain language of the deemer clause.

Respectfully submitted,

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